

**UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA**

LANDMARK LEGAL FOUNDATION
19415 Deerfield Ave, Ste. 312
Leesburg, VA 20176

Plaintiff,

vs.

Case No. 1:12-cv-01726 (RCL)

ENVIRONMENTAL PROTECTION AGENCY
1301 Constitution Ave, NW
Washington, DC 20004

Defendant.

**STATEMENT OF POINTS AND AUTHORITIES IN
RESPONSE TO DEFENDANT'S OPPOSITION
TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION**

Comes now Plaintiff Landmark Legal Foundation ("Landmark" or "Plaintiff"), pursuant to Local Rule 7(d), by and through undersigned counsel and in reply to Defendant Environmental Protection Agency's ("EPA") Opposition to Plaintiff's Motion for Preliminary Injunction respectfully submits the following:

1. Since filing its motion for preliminary injunction, Plaintiff has become aware that, at the request of Congress, the EPA Inspector General has initiated an investigation into EPA Administrator Lisa Jackson's use of an alias email account and whether records preservation laws are being complied with by her office.¹ (Exhibit 1, "EPA to probe Lisa Jackson's alias email

¹ EPA dismisses as ancient history EPA's history of failing to preserve records sought by Landmark. (EPA Opposition, p. 18.) In light of the Inspector General's investigation and Congressional inquiries, it appears that records *concealment* may be an ongoing policy in the Administrator's office.

account," POLITICO, December 18, 2012 (Available at <http://dyn.politico.com/printstory.cfm?uuid=6952B5D7-5AB4-45A0-8FFB-0248FF9DE2FA>).

"The IG plans to audit the agency's management of electronic records practices to determine whether the agency 'follows applicable laws and regulations when using private and alias email accounts to conduct official business,' according to a Dec. 13 memo from the IG." (Id.)

Moreover, "the IG wants to know whether there are adequate policies in place to collect, maintain and access records from alias email accounts and whether there is sufficient oversight to make sure EPA employees meet federal records management requirements when it comes to private or alias email accounts." (Id.)

Even now in their reply to Plaintiff's motion for preliminary injunction, EPA does not reveal this Inspector General's investigation, which is relevant to this motion. The fact that there is a source of records potentially responsive to Landmark's four month old FOIA request, that appears to have been concealed from Congress, the public, and possibly EPA officials responsible for preserving records, was left to Plaintiff to discover on a news website.²

Landmark submits that neither the Director of the Office of the Executive Secretariat, his staff, or anyone else at EPA, let alone the United States Attorney's office, Plaintiff or this Court, know what will be the Inspector General's findings. The purpose of a preliminary injunction is to preserve the status quo. Until such time as the Administrator herself is held personally responsible for ensuring compliance with her FOIA obligations, Plaintiff fears for the preservation of responsive records.

2. While EPA proceeds at break-neck speed during the holidays to finalize one of the most controversial and costly environmental regulations in the Agency's history (see

² Landmark reasserts its argument regarding satisfying expedited processing requirements and adds that given current questions about, and the IG investigation of, the propriety of EPA's records preservation and processing underscore the need for expedited processing of this request.

Plaintiff's Memorandum in support of its Motion for Preliminary Injunction, p. 4), the Agency slow-walks Plaintiff's FOIA request. Not a single piece of paper has been produced, not a description of any responsive records or any exemptions to be asserted has been proffered. Nothing but the assurance first made in EPA's opposition that Landmark's request is at the top of the queue. EPA's assertion that Landmark has ample opportunity to submit comments responsive to the Reconsideration of Certain New Source and Startup/Shutdown Issues: National Emission Standards for Hazardous Air Pollutants From Coal- and Oil-Fired Electric Utility Steam Generating Units and Standards of Performance for Fossil-Fuel-Fired Electric Utility, Industrial-Commercial-Institutional, and Small Industrial-Commercial-Institutional Steam Generating Units, 77 Fed. Reg. 71323 (EPA-HQ-OAR-2009-0234; EPA-HQ-OAR-2011-0044; FRL-9733-2) (EPA Opposition, p. 14) is flat wrong. The notion EPA advances -- that records received one month **after** the closing of a public comment period can inform Landmark's public comments -- is incomprehensible.

CONCLUSION

For reasons set forth in this memorandum and in Plaintiff's points and authorities in support of its motion for preliminary injunction, Landmark respectfully requests the Court issue an immediate injunction awarding Landmark's FOIA request expedited processing, require EPA to produce immediately responsive records, and order EPA to take steps necessary to ensure the preservation of all potentially responsive information.

Respectfully submitted,

Landmark Legal Foundation

DATED: December 20, 2012

s/ Michael J. O'Neill

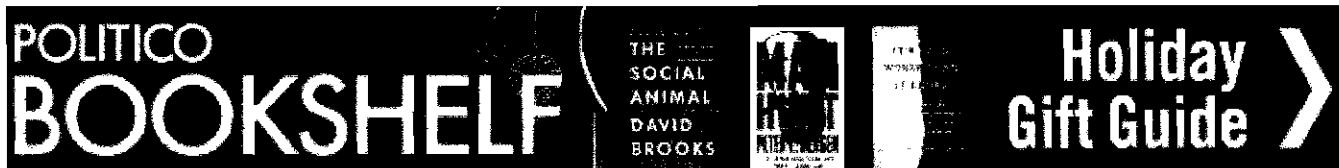
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CERTIFICATE OF SERVICE

Undersigned counsel hereby certifies that a true and accurate copy of the foregoing Statement of Points and Authorities in Reply to Defendant's Opposition to Plaintiff's Motion for Preliminary Injunction was filed electronically with the Court by using the CM/ECF system on this 20th day of December, 2012. Parties that are registered CM/ECF users will be served by the District Court's CM/ECF system.

/s/ Michael J. O'Neill
Michael J. O'Neill
Attorney for Plaintiff



POLITICO

EPA to probe Lisa Jackson's alias email account

By: Erica Martinson
December 18, 2012 04:29 AM EST

The EPA inspector general wants some answers about Lisa Jackson's EPA email account in the name of "Richard Windsor."

The Environmental Protection Agency administrator's email nom de plume is now officially the subject of an audit by the agency's inspector general, which received a congressional request to probe EPA's management of its electronic records.

There is no word as to whether the IG plans to question the family dog, which — along with Jackson's former abode of East Windsor Township, N.J. — was the inspiration for the "Richard Windsor" alias that Jackson adopted.

The practice of assigning a secondary email account to the administrator at EPA is not new to this administration. The intent, the agency says, is for the administrator to have a manageable email account in addition to the one that is openly available to the public. Jackson's alias account is an EPA.gov account, housed on government servers and subject to federal record-keeping and Freedom of Information Act requests, the agency says.

But Jackson's fictional account name raised questions about government transparency and record-keeping because it was not clearly linked to the EPA chief. Members of the House Energy and Commerce Committee and the House Science Committee have asked the agency for more information about the pseudonymous secondary email account — including whether there are safeguards to ensure that internal accounts are subject to congressional requests for information and documents.

The agency has nothing to hide, an EPA spokesman said Monday. "We said three weeks ago that we welcome any investigation," and the agency will fully cooperate with the IG, "as we would with any other investigation," the spokesman said.

The IG plans to audit the agency's management of electronic records practices to determine whether the agency "follows applicable laws and regulations when using private and alias email accounts to conduct official business," according to a Dec. 13 memo from the IG.

The office plans to find out whether anyone has been reprimanded or counseled for using private or alias email accounts for official government business and whether anyone encouraged staff to use private or alias accounts when conducting official business.

And the IG wants to know whether there are adequate policies in place to collect, maintain and access records from alias email accounts and whether there is sufficient oversight to make sure EPA employees meet federal records management requirements when it

comes to private or alias email accounts.

EPA defended the use of the email account last week in a letter to House Science Committee Chairman Ralph Hall (R-Texas).

"Given the large volume of emails sent to the public account — more than 1.5 million in fiscal year 2012, for instance — the secondary email account is necessary for effective management and communication between the Administrator and colleagues," a practice "commonly employed in both the public and the private sector," Associate Administrator Arvin Ganesan said in the Dec. 12 letter, which was provided by EPA.

The agency has policies and procedures in place to comply with the requirements of the Federal Records Act and the Freedom of Information Act, Ganesan said, noting that both the public and alias email accounts "are saved as records and are subject to FOIA requests and Congressional oversight."

"The secondary email address is redacted from released documents in order to avoid proliferation of use and the attendant loss" of its utility, with the reacted information marked as "Administrator," so that the origin is clear, Ganesan said in the letter.

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